

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**ROXANNE BURGARD**

Claimant

VS.

**DILLON'S COMPANIES, INC.**

Self-Insured Respondent

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Docket No. 1,002,032

**ORDER**

Both parties requested review of the April 23, 2003 Award by Administrative Law Judge Nelsonna Potts Barnes. The Board heard oral argument on October 8, 2003.

**APPEARANCES**

Kelly W. Johnston of Wichita, Kansas, appeared for the claimant. Scott J. Mann of Hutchinson, Kansas, appeared for the self-insured respondent.

**RECORD AND STIPULATIONS**

The Board has considered the record and adopted the stipulations listed in the Award.

**ISSUES**

The Administrative Law Judge (ALJ) determined claimant suffered a general body disability instead of a scheduled injury to the right ankle. The ALJ awarded claimant a 58 percent work disability based upon a 54 percent wage loss and a 61.5 percent task loss. The ALJ further determined that claimant was entitled to temporary total disability compensation from June 7, 2000, to August 21, 2001.

The respondent requested review of the nature and extent of claimant's disability. Specifically, respondent argues claimant should be limited to a scheduled disability to the right ankle. In the alternative, if the claimant is entitled to a work disability the respondent requests the Board to affirm the ALJ's 58 percent permanent partial disability award. Respondent further argues the ALJ erred in determining the period of time claimant was temporarily totally disabled. Stated another way respondent contends there was a larger overpayment of temporary total disability compensation than that found by the ALJ.

The claimant also requested review and disputes the amount of previously paid temporary total disability compensation.<sup>1</sup> Claimant further argues the ALJ erred in determining she did not make a good faith effort to find employment. Claimant requests the Board to affirm the ALJ in all other respects.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant was employed as a dairy manager at respondent's Dillon's store in Arkansas City, Kansas. On May 30, 2000, a wooden pallet fell striking claimant on the inside of her right ankle. Claimant was taken to the emergency room and x-rays were negative for a fracture. Claimant was restricted from weight bearing, instructed to elevate and ice the foot as well as provided Lortab pain medication.

Because of persistent pain and swelling a bone scan was performed on June 13, 2000, which resulted in normal findings. A Doppler ultrasound was performed on June 19, 2000, and also resulted in normal findings. During this time frame claimant developed a hematoma which required antibiotics and placement of a drain to reduce the hematoma.

On July 20, 2000, claimant was seen by Dr. Erik Severud for an orthopedic evaluation. The doctor diagnosed claimant with a contused right ankle or distal tibia and x-rays taken at that time were normal. An MRI of the right ankle on July 27, 2000, ruled out a tendon tear. Claimant was restricted to sedentary work. Dr. Severud continued to treat claimant through September 28, 2000, when he referred claimant to Dr. Steven J. Howell.

Dr. Howell first saw claimant on November 21, 2000, and his examination revealed claimant had possibly bruised the calcaneal branch of the posterior tibial nerve. He noted claimant had developed a large blood collection which required placement of a drain but that had healed. Claimant's ankle also had a red, cool and sweaty appearance which was consistent with reflex sympathetic dystrophy. X-rays were negative. The claimant was provided an SMO brace to limit right ankle eversion. The doctor continued claimant's restriction to sedentary work. Dr. Howell also referred claimant to Dr. M. Kent Cooper for pain management.

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<sup>1</sup> At oral argument before the Board, the parties agreed that claimant had received \$28,090.54 in temporary total disability compensation instead of the amount of \$28,376.56 that had been stipulated. Accordingly, the agreed upon figure of \$28,090.54 will be utilized to determine the amount of overpayment of temporary total disability compensation.

The medical records indicate that Dr. Cooper treated claimant with Bier blocks, which were described as anesthetic injections to the veins going to the nerves in the foot in order to anesthetize the nerves without injuring them with a direct injection. Claimant was also provided medication management and physical therapy. Initially the physical therapy provided some relief but then plateaued and failed to continue to ease claimant's discomfort. On March 16, 2001, claimant was referred for an EMG which revealed no evidence of peripheral nerve injury to the right lower extremity.<sup>2</sup> Claimant was referred to Dr. David G. Sollo who diagnosed reflex sympathetic dystrophy. The doctor treated claimant with Bier blocks on several occasions as well as additional physical therapy.

On April 17, 2001, Dr. Howell had concluded there was no further treatment that he could provide claimant. Drs. Cooper and Sollo concluded claimant had reached maximum medical improvement on August 21, 2001, and released her from further therapy. The doctors further concluded claimant had only received temporary benefit from the pain management treatment.

At the regular hearing the claimant complained of back pain as well as pain, a tingling sensation and inflexibility in her right ankle. Claimant wears a brace on her right ankle and sometimes uses a cane. Because of the ankle stiffness and pain claimant walks with a limp. After the accident claimant was unable to return to work for respondent because it could not accommodate her sedentary employment restriction. Claimant's employment was terminated.

At her last visit with Dr. Howell on April 17, 2001, claimant had mentioned she had some low back pain. Claimant could not recall whether she told all the doctors about her back pain but she agreed that she did not receive any treatment for her back. Claimant received treatment for her ankle from the date of injury until August 21, 2001, but she never received any treatment for her back. And claimant neither received nor requested treatment for her back through the date of the regular hearing on November 13, 2002.

Based upon the AMA *Guides*<sup>3</sup>, table 36, page 76, the treating physician, Dr. Howell, rated the claimant with a 25 percent permanent partial impairment to the whole body. The doctor noted claimant had some back pain which he thought might be from her antalgic gait. Although Dr. Howell initially indicated that his rating would cover any back pain caused by her antalgic gait, he later confirmed that his rating was limited to claimant's right ankle. Dr. Howell was unable to state claimant suffered a permanent injury to her back.

Q. [Mr. Mann] Are you in a position to testify today as to whether she suffered a permanent injury to her right knee, thigh, hip or back?

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<sup>2</sup> Munhall Depo., Ex. 2.

<sup>3</sup> American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

A. [Dr. Howell] No.<sup>4</sup>

Q. Going back, and I don't mean to beat a dead horse, doctor, but in your opinion, is Ms. Burgard's impairment the result of her May 2000 injury limited to her right lower extremity or right ankle in this case within reasonable medical probability?

MR. JOHNSTON: Again, objection, asked and answered.

Q. Doctor, you can answer.

A. I am trying to be consistent with myself. I gave a previous opinion, but yes, I think the main injury happened to her right lower extremity. Everything else is not permanent.<sup>5</sup>

Dr. Howell agreed that the 25 percent whole person rating provided by table 36 would extrapolate to a 62 percent lower extremity rating.

On March 24, 2002, claimant was in an automobile accident and injured her right leg with the development of a hematoma of the anterior thigh. This required incision and drainage. Claimant noted she did not suffer any other significant injury and did not aggravate or accelerate the pain in her right ankle.

Dr. Philip R. Mills examined claimant on June 18, 2002, at the request of respondent's attorney. The doctor diagnosed claimant with chronic regional pain syndrome or reflex sympathetic dystrophy of the right ankle. Upon examination the doctor noted claimant walked with a limp. His examination revealed claimant's range of motion of her lumbosacral spine was excellent upon forward flexion as claimant could bring her fingertips to her toes. Based upon the *AMA Guides*, the doctor opined claimant had suffered a 20 percent permanent partial functional impairment to her right lower extremity. The doctor restricted claimant to sedentary employment.

Dr. Michael H. Munhall examined claimant on July 31, 2002, at the request of her attorney. Dr. Munhall concluded claimant reached maximum medical improvement upon her release from treatment by Drs. Sollo and Cooper on August 21, 2001. Upon examination the doctor noted marked loss of forward flexion in that claimant was unable to touch her toes. The doctor opined claimant had suffered a 72 percent permanent partial impairment to the right lower extremity which converted to a 30 percent whole person impairment. And the doctor rated claimant's low back at 5 percent which combine for a 34 percent permanent partial functional impairment to the whole person. The doctor limited claimant to sedentary activities.

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<sup>4</sup> Howell Depo. at 25.

<sup>5</sup> Id. at 31-32.

The workers compensation act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.<sup>6</sup> “‘Burden of proof’ means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party’s position on an issue is more probably true than not true on the basis of the whole record.”<sup>7</sup>

Initially, it must be determined whether claimant suffered scheduled or non-scheduled injuries as a result of her work-related accident on May 30, 2000. The Act recognizes two different classes of injuries which do not result in death or total disability. An injured employee may suffer a permanent disability to a scheduled body part or a permanent partial general disability.<sup>8</sup> It is the situs of the disability, not the situs of the trauma, that determines which benefits are available.<sup>9</sup> The Board, as a trier of fact, must decide which testimony is more accurate and/or more credible and must adjust the medical testimony along with the testimony of the claimant and any other testimony that might be relevant to the question of disability.<sup>10</sup>

Drs. Howell and Mills concluded claimant only suffered permanent impairment to her right lower extremity. But Dr. Munhall also determined claimant suffered permanent impairment to her lower back as a result of her antalgic gait.

The claimant complained of and received medical treatment for right ankle pain for an extended period of time after her work-related injury. The treatment modalities directed at the claimant’s right ankle complaints included medications, extensive physical therapy and injections. Although claimant experienced some temporary relief from time to time over her extended period of treatment, nonetheless, her right ankle complaints remained consistent. It is undisputed claimant developed a limp from wearing the prescribed ankle brace as well as from the pain in her right ankle.

It is significant that with the exception of claimant’s last office visit with Dr. Howell, the medical records do not contain reference to back pain. And claimant agreed that she never requested medical treatment for her alleged back pain. A physical therapist testified that during the time he provided therapy the claimant’s complaints were limited to her right ankle. The treating board certified orthopedic surgeon, Dr. Howell, ultimately concluded that claimant’s permanent impairment was limited to her right lower extremity. Dr. Mills

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<sup>6</sup> K.S.A. 1999 Supp. 44-501(a).

<sup>7</sup> K.S.A. 1999 Supp. 44-508(g).

<sup>8</sup> K.S.A. 1999 Supp. 44-510d; K.S.A. 1999 Supp. 44-510e.

<sup>9</sup> *Bryant v. Excel Corp.*, 239 Kan. 688, 722 P.2d 579 (1986).

<sup>10</sup> *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

also concluded claimant's permanent impairment was limited to her right lower extremity. The Board finds the opinion of Drs. Howell and Mills more persuasive than the contrary opinion expressed by Dr. Munhall. Consequently, the Board concludes claimant's permanent impairment from her work-related injury is limited to her right ankle. The Board further adopts the treating physician's opinion that claimant suffers a 62.5 percent permanent partial functional impairment to her right lower leg. Accordingly, the ALJ's Award is modified to reflect claimant suffered a 62.5 percent permanent partial functional impairment to her right lower leg.

On the issue of the overpayment of temporary total disability compensation the ALJ noted:

The parties stipulated to an average weekly wage of \$570.41 per week without fringe benefits. The Claimant's fringe benefits were continued by Respondent until September 1, 2001. The correct temporary total disability rate is \$380.29 per week. Claimant is entitled to temporary total disability benefits at the rate of \$380.29 per week from [sic] June 7, 2000 to August 21, 2001 for sixty-two point eight six weeks (62.86) or total temporary total benefits of \$23,905.03. This calculation results in an overpayment of temporary total disability compensation in the sum of \$4,471.53.<sup>11</sup>

The Board affirms the ALJ's determination that claimant is entitled to temporary total disability compensation from June 7, 2000, through her release from treatment with Drs. Sollo and Cooper on August 21, 2001. As previously indicated in a footnote, the parties agreed at oral argument before the Board that claimant had received temporary total disability compensation in the sum of \$28,090.54. Accordingly, the overpayment of temporary total disability compensation is the sum of \$4,185.51.

It should be noted, as previously indicated by the ALJ, the claimant's fringe benefits were continued by respondent until September 1, 2001. Consequently, for the time period from August 21, 2001, through September 1, 2001, the claimant's average weekly wage did not include her fringe benefits and her permanent partial disability compensation payment rate would be \$380.29 per week. After September 1, 2001, her payment rate would increase to the \$383 per week statutory maximum.

### **AWARD**

**WHEREFORE**, it is the finding of the Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated April 23, 2003, is modified to reflect claimant suffered a 62.5 percent permanent partial functional impairment to the right lower leg.

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<sup>11</sup> Award at 5.

The claimant is entitled to 62.86 weeks of temporary total disability compensation at the rate of \$380.29 per week in the amount of \$23,905.03 followed by 1.71 weeks of permanent partial compensation at the rate of \$380.29 per week in the amount of \$650.30 for the period of August 21, 2001, through September 1, 2001, followed by 77.75 weeks of permanent partial compensation at the rate of \$383 per week in the amount of \$29,778.25 for a 62.5 percent loss of use of the lower leg, making a total award of \$53,333.58, which is due, owing and ordered paid in one lump sum less amounts previously paid.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of November 2003.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Kelly W. Johnston, Attorney for Claimant  
Scott J. Mann, Attorney for Respondent  
Nelsonna Potts Barnes, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director